

# Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?

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*The reconstruction of legal expectations when parties remain silent is not only speculative but also question-begging and tautological. Perceptions of fairness are substituted for the actual volition of the parties to be validated through other means. By contrast, the parties' factual expectations do carry weight in determining the reach of a state's power over them. Recent Supreme Court decisions on jurisdictional due process, especially World-Wide Volkswagen v. Woodson, employ a methodology which satisfactorily distinguishes between expectations of law and fact. But in the conflicts case of Allstate Ins. Co. v. Hague the Court dubiously reconstructed and relied on hypothetical expectations which did not materialize and its import should be limited on its facts and to the insurance field.*

Starting with *Shaffer v. Heitner*,<sup>1</sup> and continuing with *Kulko v. Superior Court*,<sup>2</sup> *World-Wide Volkswagen v. Woodson*<sup>3</sup> and *Rush v. Savchuk*,<sup>4</sup> the United States Supreme Court began to reconsider the major premises of due process judicial jurisdiction, especially those of limited ad hoc jurisdiction (*quasi in rem* and *in*

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1. 433 U.S. 186 (1977).

2. 436 U.S. 84 (1978).

3. 444 U.S. 286 (1980).

4. 444 U.S. 320 (1980).

rem) and specific jurisdiction (long-arm). In *Allstate Insurance Co. v. Hague*,<sup>5</sup> the Court broke a fifteen-year string of rejections of certiorari and finally addressed the due process and full faith and credit dimensions of legislative jurisdiction and choice-of-law.

In all of these cases, and more particularly in *World-Wide Volkswagen* and *Allstate*, one of the fundamental considerations was fairness to the party subjected to the jurisdiction or law of a particular state, and the "touchstone" or the lynchpin of fairness is said to be the "reasonable expectation of the parties."<sup>6</sup> Party expectations may also have some significance in the allocatory function of due process and full faith and credit by preventing state overreaching and infringement of the co-equal sovereignty of the other states under federalism.<sup>7</sup> Before analyzing and evaluating the use of party expectations by the Supreme Court as a factor of due process, it will be helpful to revisit the meaning and role of the concept of party expectations at the level of choice-of-law proper in situations where there is no constitutional compulsion.

If there is one proposition that transcends the disputations between traditionalists and modernists in conflicts, it is that the justified or reasonable expectations of the parties do carry some weight in the choice-of-law process. This is not to say that differences of opinion do not persist as to their relative importance. Those who emphasize the private nature of the rights in conflict, such as Professor M. Rheinstein, elevate the vindication of party expectations to a primary, if not the principle consideration.<sup>8</sup> Others, especially the adherents of the governmental interests school of conflicts, such as Professors B. Currie and R. Baxter, play them down.<sup>9</sup>

It is with the party autonomy component of party expectations that the consensus of conflicts authorities has been at its maximum. Within certain limits, the parties are allowed to fix the applicable law as part of their agreement. For example, under section 187 of the Restatement (Second) of Conflicts of Law (Second Restatement), autonomy is total on matters of contract inter-

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5. 449 U.S. 302 (1981).

6. *Id.* at 651 (Powell, J., dissenting).

7. 449 U.S. at 324 n.11 (Stevens, J., concurring).

8. Rheinstein, *Ehrenzweig on the Law of Conflict of Laws*, 18 OKLA. L. REV. 238, 241 (1965); Rheinstein, *Book Review: Ehrenzweig, Conflict of Laws*, 32 U. CHI. L. REV. 369, 370, 374-75 (1965); Rheinstein, *Book Review: How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 658-59 (1962); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17-31 (1944). *Cf.* E. RABEL, 2 THE CONFLICT OF LAWS: A COMPARATIVE STUDY 304 (2d ed. 1960).

9. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, especially at 621, 730-33, 736-39 (1963); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 3, 22 (1963).

pretation. However, on other issues such as formalities, capacity and substantive validity, it is required that the parties' choice have a "reasonable" basis (*e.g.*, a substantial relationship to the parties or the transaction) and that the application of the chosen law not be contrary to a fundamental policy of a state having a materially greater interest and whose law would have been otherwise applicable.<sup>10</sup> Section 1-105 of the Uniform Commercial Code (UCC) appears even more permissive, providing that the parties can effectively choose the UCC to govern if it bears a mere "reasonable relation" to the transaction.

Effectuating the will of the parties and reinforcing the security of transactions are often cited as the principle reasons for upholding party autonomy.<sup>11</sup> In the words of comment (e) to section 187 of the Second Restatement:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. . . . In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine their contractual obligations.

In the autonomy context, the expectations, whether express or implied,<sup>12</sup> are *actual* and *common* to all the parties concerned. The case for their recognition is simple and straightforward and their content can be established under the proven methods of contract interpretation. Whether the expectations are reasonable is to be determined under criteria which may not be very precise but are manageable under conflicts analysis.

In terms of its status, the rule that the parties may choose the applicable law is just another conflicts rule and, indeed, of relatively low rank since it must yield, for example, to the fundamental policies of the otherwise applicable law.<sup>13</sup> Further, the rule is

10. On the limits of party autonomy, *see, e.g.*, *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123, 127 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (9th Cir. 1979); *Business Incentives Co. v. Sony of America*, 397 F. Supp. 63, 67 (S.D.N.Y. 1975); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 65 F.R.D. 624, 630-31 (D. Nev. 1974); *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977).

11. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-38 (1957).

12. For recent authorities on choice-of-law by implication, *see, e.g.*, *Zeevi v. Grindlays Bank Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892 (1975). *See generally*, *Kegel, The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 95, 189-91 (1964).

13. *See, e.g.*, *Southern Int'l Sales Co. v. Potter & Brumfield*, 410 F. Supp. 1339 (S.D.N.Y. 1976).

limited because, by its very nature, it operates only in the area of consensual transactions (*e.g.*, the rule does not operate in tort law).

The trouble begins when the reasonable or justified expectations of the parties are sought to be used outside and beyond the range of the rule of party autonomy. The Second Restatement uses fairly representative language in support of this extended use.

The Magna Carta of "Choice-of-Law Principles", enshrined in section 6 of the Second Restatement, specifically includes "the protection of justified expectations" among the seven basic factors. Comment (g) on section 6 gives us some clues as to its meaning and rationale:

This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state. . . . There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.<sup>14</sup>

Turning to comment (b) on section 188 of the Second Restatement, we are told more specifically that protecting "the justified expectations of the parties is a basic policy underlying the field of contracts" and that "it may at least be said . . . that they expected that the provisions of the contract would be binding on them".<sup>15</sup> In other words, in the absence of an express or implied choice of law by the parties, we should lean toward validation of the contract.<sup>16</sup>

When it comes to torts, the expectations of the parties are substantially downgraded in comment (b) to section 145(1) of the Second Restatement:

Thus, the protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts. This is because persons who

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14. Professor Reese, the Restatement Reporter, expresses a similar position in Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1595, 1608 (1978). See also Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 329-30 (1972). Cf. *Hughes v. Fetter*, 341 U.S. 609, 617-18 (1951) (Frankfurter, J., dissenting).

15. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188, comment b (1971).

16. This validation preference is not altogether beyond dispute. For example, Currie has challenged the proposition that the probable intention of the parties to be bound in contract should be determinative in choosing the applicable law and in deciding which state's validation policy ought to prevail. The identical intention to be bound presumably does exist also in a purely domestic situation but the issue is really if, in reaching a decision on whether the contract is binding, such intention ought to prevail over the invalidating policies reflected in other principles. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 103 (1963).

cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct.<sup>17</sup>

At first glance, these quotes appear quite sensible. But a closer examination quickly dispels this favorable impression and raises serious doubts about the meaning and utility of the very concept of "justified expectations" as a conflicts factor beyond party autonomy.

We are told by the Second Restatement that if a person "justifiably molded his conduct to conform to the requirements"<sup>18</sup> of the law of a particular state, it would be unfair and improper to hold him liable under the law of another state. But how are we to ascertain whether (a) in fact, that person so molded his conduct and (b) this was justified? We are given no guidance on how to verify the actual reliance upon a particular law in the absence of an express or implied choice of law clause; and on what the source of the justification might be. The fiction that parties do form conscious expectations as to the identity of the normative criteria by which their activities will be judged, that they in fact rely on the requirement of a particular norm and that such reliance is capable of identification has been seriously questioned.<sup>19</sup> This fiction has been exposed most tellingly and persuasively by Professor Shapira.<sup>20</sup> Shapira concludes that reconstructing or hypothesizing party expectations as to the applicable law obscures legal reasoning<sup>21</sup> and that their purported vindication is "nothing but an empty slogan".<sup>22</sup>

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17. See RESTATEMENT § 145, comment b, *supra* note 15.

18. See RESTATEMENT § 6, comment g, *supra* note 15.

19. See, e.g., *Berkant v. Fowler*, 55 Cal.2d 588, 360 P.2d 906 (1961); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968). See also D. CAVERS, *THE CHOICE OF LAW PROCESS* 302 (1965); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 189 n.17 (1976); R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 359 (3d ed. 1981).

20. A. SHAPIRA, *THE INTEREST APPROACH TO CHOICE OF LAW* 81, 85 (1970).

21. *Id.* at 81.

22. Shapira, "*Grasp All, Lose All*"—*On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 267 (1977). See also Ratner, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 N.W.U.L. REV. 363, 379, 380 (1980):

[J]urisdictional foreseeability is a conclusion that implies advance litigant perception of relevant grounds for jurisdiction. The foreseeability concept itself cannot provide these grounds. . . . Jurisdictional foreseeability, derived from either forum activity or probable product presence, must be preceded by judicial support for such jurisdiction, and that support obviates foreseeability.

The difficulty with party expectations becomes even more acute when one focuses on the additional requirement that they be reasonable or justified. Where are we to search for the justification? Justification would be superfluous if it is to derive from the existing choice-of-law rules themselves, since the rules would apply in any event regardless of the justified expectations. Relying on the expectations themselves to generate conflicts rules leads into a tautology and circuity of argumentation—the expectations as to what law is to apply would apply because of the expectations and the expectations would be justified because of the applicable law.

Finally, if we turn to the parties' mutual perception of what the conflicts rules *ought to be*, assuming arguendo that such perception can be proven which is extremely doubtful, we do nothing more than beg the question of its legitimacy and open up the Pandora's box of undefined natural justice.<sup>23</sup> Professor Weintraub's original reliance on the concept of "unfair surprise" to protect the defendant in an otherwise pro-plaintiff system of tort choice-of-law<sup>24</sup> suffers from the same defects. We are not told how to establish the fact of such "surprise" and how to determine its unfairness.<sup>25</sup>

A closer examination of the expectations or surprise arguments shows that what we are dealing with is not an independent element but just another version of the theory of appropriate and fair contacts. To take the simplest case, if the parties and the occurrence relate only to one state, we assume that the parties acted in reliance upon the law of such state or at least they expected that such law would apply and we decide that such reliance and expectation is justified under the applicable conflicts and constitutional criteria. It is on this basis that we conclude that the parties would be unfairly surprised if another law were to apply. The greater the planning element in the particular context

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23. On the problem of justification, see Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 191 (1976)). See also J. MARTIN, *CONFLICT OF LAWS* 368 (1978); Leflar, *Constitutional Limits on Free Choice of Law*, 28 L. & CONTEMP. PROB. 106, 723 (1963). Cf. *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970) (Roberts, J., dissenting).

24. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 209 (1971); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449-62 (1959).

25. "Doesn't Weintraub's argument come to the right result for the wrong reasons—the defendant perceives the result [applying plaintiff's home state law] as unfair precisely because it is unfair, and not vice versa?" J. MARTIN, *PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW* 152 (1980). It should be noted that Professor Weintraub's recent statements contain changes which alter significantly the complexion of his approach: for "unfair surprise" he has substituted the objective factors of "contacts with the defendant or the defendant's actual or intended course of conduct." R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 346 (2d ed. 1980).

(e.g. in consensual transactions or in intentional conduct) the more pressing the need to give effect to those kind of expectations and to prevent unfair surprise.

The question-begging nature of these theories leads us back to the fundamental issue of what circumstances make it appropriate and fair for a state to apply its law in a particular case. Our analysis has thus established that what we are looking for is not so much the parties' speculative, subjective expectations but some objective standard of rationality and fairness to justify the application of a particular law in a multistate situation.<sup>26</sup> In the constitutional context, it is the function of due process to ensure that the states do not extend the limits of their judicial power and the applicability of their law beyond reason and fairness. For the reasons already given, if the parties' legal expectations are dubious in choice-of-law proper, they are doubly questionable in defining the due process and full faith and credit parameters of state autonomy in jurisdiction and choice-of-law.

To explore this point a bit further, let us assume that a state has given fair notice as to the reach of its jurisdictional and legislative powers<sup>27</sup> and that it does not improperly extend the retroactive exercise of such powers.<sup>28</sup> The question, then, of whether

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26. MARTIN, *supra* note 20; SHAPIRA, *supra* note 17, at 87 ("In lieu of a futile endeavor to reason in terms of vindication of subjective expectations, one should invoke an objective and functional test of rational connection as a fair criterion of justice to private interests").

27. That the exercise of state jurisdictional powers should be based on specific rules giving adequate notice of their purpose and reach is intimated both in *Shafer v. Heitner*, 433 U.S. 186, 214-16 (1977) and in *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978). See also *Sun First Nat. Bank of Orlando v. Miller*, 77 F.R.D. 430, 439 (S.D.N.Y. 1978). Cf. *The Supreme Court 1976 Term*, 91 HARV. L. REV. 152, 161 & n.59 (1977). On the other hand, the plurality opinion in *Allstate v. Hague*, 191 S. Ct. 633, 642-43 (1981) upheld the application of Minnesota law *inter alia* on the basis of Minnesota's regulatory powers over companies doing insurance business within the state even though the controversy had no connection whatsoever with such business and Minnesota had not enacted statutory rules purporting to exercise such powers. The dissent took issue with this approach. *Id.* at 653.

By way of contrast, we could refer to the no-fault insurance law of New York which contains explicit provisions on its applicability to out-of-state policies but only while the insured vehicle is being operated in New York. N.Y. INS. L. § 676 (McKinney supp. 1979).

28. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 737-38 (1963); Neuner, *Policy Considerations in the Conflict of Laws*, 20 CAN. B. REV. 479, 482-84 (1942). Cf. *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

It might be observed that if there is one area where the justified expectations of the parties should carry great weight in choice-of-law, it should be (a) to prevent the retroactive change of conflicts rules by judicial reconsideration in pursuit of

such state's jurisdictional rule is consistent with due process cannot be answered by reference to the subjective expectations of the parties, if the parties had any. The parties should have known and anticipated the application of these rules. Whether this is justified cannot depend on the parties' actual or hypothetical expectations as to fairness except in the most philosophical sense, that the law in a democratic society ought to be responsive to the general popular will. It is the United States Constitution that embodies the supreme law establishing due process and it is for the United States Supreme Court to articulate the criteria defining fairness under due process. Hence, whether particular parties believe in and approve of *lex loci delicti* is irrelevant to its scrutiny under due process.

This becomes even clearer when we consider the place of "party autonomy" in choice-of-law. It is here that the parties by common agreement unambiguously select the law which they wish and expect to apply. Yet, as a matter of conflicts law, such expectations are given effect only if they are reasonable and not contrary to the policy of the state with the most significant relationship to the parties.<sup>29</sup> *A fortiori*, such expectations cannot determine the scope of the power of a state to define the interstate or international dimension of its legislative and judicial jurisdiction. In fact, the Supreme Court has paid scant attention to contractual clauses attempting to control the choice-of-law and has instead routinely upheld the application of the law of another state.<sup>30</sup>

Even though the expectations of the parties as to the applicable rules of jurisdiction or choice-of-law should be disregarded in a due process context, the same is not true of the parties' expectations *as to facts* or their predictions on whether a particular event or transaction will in fact be connected with a particular state. This is an important distinction which should be articulated and kept in mind. The very notion of "purposeful availment" of the protection and benefits of the laws of a state which is central to due process analysis signals the relevance of the parties' reasonable projections that their activities will or will not have an out-of-state dimension.

The issue here is one of reasonable foreseeability of the requisite factual connections, not of legal perceptions about jurisdic-

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the conflicts revolution and (b) to prohibit the taking into account of post-event changes in circumstances such as plaintiff's change of domicile.

29. See note 10 *supra*.

30. See, e.g., *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, 294 U.S. 532 (1935); *Pacific Employees Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 498 (1939).



tion, conflicts or substantive legal rules. The mere connection of an event with a state should not suffice to trigger jurisdiction or the application of a particular law. The connection should be attributable to a party under rules which require reasonable foreseeability as an indispensable, but not necessarily, sufficient prerequisite.<sup>31</sup>

To illustrate the difference between expectations of law and expectations of fact, let us suppose that all states follow a *lex loci delicti* approach with the place of the harm as its centerpiece. If a person's activities in State *A* create the reasonable probability that harm will occur only in States *A*, *B* and *C*, then it would be justifiedly unexpected and unfairly surprising to subject that person to the law of State *D* where the harm actually happened to occur. By the same token, if only some of the states follow the *lex loci delicti* and other states, such as State *D*, use the governmental interests analysis and rely principally on the victim's domicile in choosing the applicable law, then the defendant who creates a foreseeable risk of harming a resident of State *D* could justifiably be subjected to the law of that other state, whatever the *locus* of the harm. The foreseeable content of a particular conflicts rule

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31. As aptly put by Professor Shapira:

If the party can reasonably be charged with fair notice as to the potential transnational ramifications of the affair at hand then one may conclude that a rational connection does exist between that party and the foreign legal standard. . . . [T]he party in question could have reasonably perceived at the relevant time a possible contact with, or impact upon, persons, property, institutions or events which might fall within the prescriptive domain of a given legal system.

Shapira, "Grasp All, Lose All"—*On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 268 (1977).

The proper relation between expectations and contacts in a due process context was clearly recognized in the recent case of *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 582 (8th Cir. 1981), where it was stated that:

When parties' expectations are rationally based upon one state's laws, or in the negative, when their rational expectations are not based upon the laws of some other state, it violates due process to breach those expectations by applying the unexpected law. When the forum's contacts with the parties or the transaction satisfy the Court's "significant contacts" test, however, it follows, necessarily, that no party may "reasonably" expect that the forum state's law cannot control the case. In such a situation, the forum state's power to apply its own law is unquestionable.

See also the recent version of Professor Weintraub's approach in R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 326-28, 511-12 (2d ed. 1980); Weintraub, *The Future of Choice of Law for Torts—What Principles Should be Preferred?*, 41 L. & CONTEMP. PROB. 146, 159-63 (1977); and Leflar, *Choice Influencing—Considerations in Choice of Law*, 41 N.Y.U.L. REV. 267, 299-300 (1966). Cf. RESTATEMENT OF CONFLICTS OF LAW § 387, comment a (1934).

would have nothing to do with the protected expectations of the parties. Such expectations would relate only to the factual elements of the case.

If the preceeding analysis is correct, then the real problem in this field is to determine the qualitative and quantitative criteria which make foreseeability of factual contacts a reasonable basis for the assertion of the related state power. In situations where jurisdiction or choice-of-law is based on the *locus* of conduct or on personal affiliations with a particular state such as domicile and residence, a party who knowingly or intentionally establishes or creates the necessary connection could be charged with the jurisdictional and conflicts consequences without frustrating any justified expectations. The same result should prevail even in negligence situations where the conduct takes place within a particular state or states. The intention to engage in the conduct in that locality and the creation of the risk there should suffice for reasonable foreseeability. The fact that the negligence and the harm were not intended or contemplated should be without significance in that context.

The Second Restatement's reference in section 6, comment (g), to a party "molding his conduct to conform to the requirements of a state"<sup>32</sup> should be rephrased to negate the implication that such conduct must be lawful under the law of such state. The decisive element should be the expected factual connection of the conduct with the state, not its expected legality. Similarly, the distinction in the same comment (g) between intentional and negligent conduct should be dropped because what matters is the intentional *location* of the conduct, not any perception about legal consequences, jurisdiction or applicable law.

The area where reasonable foreseeability is most important and also where the greatest difficulties are encountered involves jurisdiction or choice-of-law based upon "effects" within the state. Assuming that substantial and direct effects (including single events such as one transaction or one injury) alone or in combination with other contacts constitute a sufficient contact for long-arm jurisdiction over, or the application of a state's law, to the actor, what is the quantum and quality of foreseeability required before the fairness requirement is satisfied? The issue has arisen most often in the context of long-arm jurisdiction. In conflicts law, it is also becoming an increasingly prominent issue in the area of product liability.

The current versions of long-arm statutes contain specific "ef-

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32. See RESTATEMENT § 6, comment g, *supra* note 15.

fects" sections where foreseeability of harm within the state, albeit not always sufficient, is necessary. In New York, Civil Practice Rule 302(a)(3)(ii) provides that a person who commits a tortious act outside the state causing in-state injury is amenable to suit in the state if he "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."<sup>33</sup> Ohio provides for long-arm jurisdiction over a person causing injury within the state to any person:

By breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.<sup>34</sup>

Section 37 of the Second Restatement deals with "effects" jurisdiction in the following language:

*Causing Effects in State by Act Done Elsewhere.* A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.<sup>35</sup>

Identical language with respect to corporations is contained in section 50 of the Second Restatement. Comment (a) to section 37 makes it abundantly clear that the actor's state of mind is the most important element in determining reasonableness. If the actor intended causing effects within the state, the actor is treated as if he was, in effect, acting within the state. At the other extreme, where there was no foreseeability of effects within the state, the "state is unlikely to have judicial jurisdiction . . . unless [both parties] have an extensive relationship to the state."<sup>36</sup> In the intermediate situation where the defendant's act "could reasonably have expected" to produce in-state effects, a variety of factors are taken into consideration in evaluating jurisdiction.<sup>37</sup>

For choice-of-law, a good illustration is contained in Professor

33. N.Y. CIV. PRAC. LAW § 302(a)(3)(ii) (McKinney Supp. 1979).

34. OHIO CIV. PRO. CODE Rule 4.3(A)(5) (1970).

35. See RESTATEMENT § 37, *supra* note 15.

36. See RESTATEMENT § 37, comment a, *supra* note 15.

37. For cases where § 37 was applied by the courts with an emphasis on foreseeability analysis, see, e.g., *Hapner v. Rolf Brauchli, Inc.*, 71 Mich. App. 263, 247 N.W.2d 375 (1976) (the presence of the hairdryer in the state "could be expected"), *Anderson v. Luitjens*, 247 N.W.2d 913 (Minn. 1976) (in the circumstances, it was

Cavers' most recently proposed principle of preference for producer's liability. Adoption of this principle would permit the claimant to invoke the favorable law of either (a) the state of his habitual residence and product acquisition or harm or (b) the state of product acquisition and harm unless "the producer established that he could not reasonably have foreseen the presence in that state of his product which caused harm to the claimant or his property."<sup>38</sup> A comparable example is to be found in Article 7 of the Hague Draft Convention on the Law Applicable to Products' Liability (1972) in the preparation of which the American delegation had significant input.<sup>39</sup> It reads as follows:

Neither the law of the state of the place of injury nor the law of the state of the habitual residence of the person directly suffering damage shall be applicable . . . if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that state through commercial channels.<sup>40</sup>

With reference to international transactions, the foreseeability of a direct and substantial effect is again recognized as a crucial factor both in jurisdiction and in choice-of-law based on effects (objective territorial principle). In section 18(b)(iii) of the Restatement (Second) of the Foreign Relations Law of the United States (1965), it is recognized that a state has jurisdiction to legislate with respect to foreign conduct having substantial domestic effects, *inter alia*, if the effects occur "as a direct and foreseeable result of the conduct outside the territory."<sup>41</sup>

In *Leasco Data Processing Equipment v. Maxwell*,<sup>42</sup> Judge Friendly relied, presumably by analogy, on the foreseeability language of section 18 to dismiss for lack of personal jurisdiction a

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reasonable for defendant to foresee that serving liquor to a minor in Iowa might lead to an accident in Minnesota).

It is interesting to note that the connections used to reinforce "effects" jurisdiction are often not related to the claim and sometimes not even related to the state. See, e.g., the New York reference to deriving "substantial revenue from interstate or international commerce." N.Y. CIV. PRAC. § 302(a)(3)(ii); REPORT TO THE 1966 LEGISLATURE IN RELATION TO C.P.L.R. CIV. PRAC. AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW, TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK 337, 343-44 (1967). See also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167-73 (1966).

38. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L & COMP. L.Q. 703, 728-29 (1977).

39. *Id.* at 721-22.

40. *Documents*, 21 AM. J. COMP. L. 149, 151 (1973).

41. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b)(iii) (1965). Cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(c), 403(2)(a), 403(2)(a)(d) (jurisdiction to prescribe) and § 441(2)(j) (jurisdiction to adjudicate) (Revised, Tentative Draft No. 2, 1981).

42. 468 F.2d 1326 (2d Cir. 1972).

claim against a United Kingdom partnership for the alleged preparation of misleading statements which were eventually delivered to the plaintiff in violation of section 10(b) of the Securities and Exchange Act of 1934.<sup>43</sup> Elaborating on the requisite foreseeability, Friendly added that:

We believe, moreover, that attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him.<sup>44</sup>

In a footnote to this passage it was stressed that in product liability cases, sufficiently extensive activity in interstate commerce by the manufacturer would satisfy the requirement of creating a foreseeable risk in any one of the states served.<sup>45</sup>

In a subsequent 10(b) case, *Bersch v. Drexel Firestone, Inc.*,<sup>46</sup> Judge Friendly again returned to section 18. In the context of subject-matter (legislative) jurisdiction, he read such jurisdiction as not applying to fraud committed abroad if there was no intention that the securities should be offered to anyone in the United States. In reaching this conclusion, Friendly cited Justice Holmes' reference, in *Strassheim v. Daily*, to "acts done outside the jurisdiction, but intended to produce and producing detrimental effects within it,"<sup>47</sup> and distinguished *Steele v. Bulova*<sup>48</sup> where there was foreseeability of an effect within the United States.<sup>49</sup> As for *in personam* jurisdiction, Judge Friendly cited both section 18 and section 37 of the Second Restatement in support of his ruling that the defendant was not amenable to suit in New York though he knew of the fraudulent underwriting because "there is nothing to show [he] had knowledge that some of the purchasers would be persons residing in the United States."<sup>50</sup>

An approach which eliminates party expectations as to the applicable law from the due process calculus, and which limits the relevance of factual expectations to the probable materialization of the requisite jurisdictional and choice-of-law contacts, can be easily reconciled with the recent Supreme Court jurisdictional

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43. 15 U.S.C. § 78j (1976).

44. 468 F.2d at 1341.

45. *Id.* at 1341-42 n.11.

46. 519 F.2d 974 (2d Cir. 1975).

47. 221 U.S. 280, 284-85 (1911).

48. 344 U.S. 280 (1952).

49. 519 F.2d at 988-89 n.35.

50. *Id.* at 1000.

cases. Such an approach, however, is bound to be quite critical of the latest choice-of-law case.

#### THE JURISDICTIONAL CASES

While the majority opinion in *Shaffer v. Heitner*<sup>51</sup> included general language about the defendants' having "no reason to expect to be haled before a Delaware Court,"<sup>52</sup> it is quite clear that the point being made was that the corporate fiduciaries as such "had simply nothing to do with the State of Delaware."<sup>53</sup> Their two Delaware contacts, to wit (a) their acceptance of a directorship in a Delaware corporation in the absence of a consent statute and (b) their ownership of some stock in a Delaware corporation, were insufficient contacts under due process.

In his concurring opinion Justice Stevens argued that:

[O]ne who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a [remote] forum. Delaware . . . in effect, impose[s] a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the state of incorporation . . . and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation.<sup>54</sup>

The Stevens' concern over the unreasonableness of this duty of inquiry for nationally traded securities is pragmatically motivated and quite consistent with the perception of foreseeability as a question of fact.

In his *Shaffer* dissent, Justice Brennan dealt with expectation issues in greater detail, taking the position that the defendants here are amenable to suit based on "out-of-state acts having foreseeable effects in the forum state."<sup>55</sup> He perceived "little difficulty in applying this principle to nonresident fiduciaries whose alleged breaches of trust are said to have substantial damaging effect on the financial posture of a resident corporation."<sup>56</sup> Conceding that Greyhound Inc. was a Delaware resident only in name, Brennan nevertheless insisted that a state's regulatory interest in the internal affairs of locally incorporated entities supported the state's assertion of jurisdiction.<sup>57</sup> Even if Greyhound were to be treated as a Delaware resident, it would not follow that the requisite "effect" occurred within Delaware. An effect upon a state resident is not necessarily an in-state effect. Brennan is on more solid ground when, citing *Hanson v. Denkla*, he referred to the

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51. 433 U.S. 186 (1977).

52. *Id.* at 216.

53. *Id.*

54. 433 U.S. at 218-19.

55. *Id.* at 226.

56. *Id.*

57. *Id.*

"crucial fact" of the defendants' voluntary association with Delaware as the "entering into a long-term and fragile[?] relationship" with a Delaware corporation, assuming powers, undertaking responsibilities and becoming eligible for benefits under its laws.<sup>58</sup>

In *Kulko v. Superior Court*<sup>59</sup> there was only one brief reference related to expectations. The defendant New Yorker's single act of acquiescing to the preference of his daughter to live with her mother in California was:

[S]urely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] Court,' *Shafer v. Heitner*.<sup>60</sup>

It is to be remembered that California had attempted to assert *in personam* jurisdiction based on the "effect" of defendant's sending his daughter to live in California. The quoted passage came after the Court's determination that defendant "did not purposefully derive benefit from any activities relating to the State of California"<sup>61</sup> and that subjecting him to suit in California was "neither fair, just nor reasonable."<sup>62</sup> Thus, the reference to the jurisdictional expectations of the defendant appears to be nothing more than a conclusory statement reinforcing the unfairness of the California jurisdiction. The statement is not supported by any factual findings of the defendant's actual state of mind and there is no indication that any such expectations would have mattered

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58. *Id.* at 227-28. More perplexing is Brennan's discussion of the jurisdictional relevance of consent, where the requisite contacts and the related expectations are closely intertwined. In Brennan's view:

If one's expectations are to carry such weight, then appellants here might be fairly charged with the understanding that Delaware would decide to protect its substantial interests through its own courts, for they certainly realized that in the past the sequestration law has been employed primarily as a means of securing the appearance of corporate officials in the State's courts. Even in the absence of such a [consent] statute, however, the close and special association between a state corporation and its managers should apprise the latter that the state may seek to offer a convenient forum for addressing claims of fiduciary breach of trust.

*Id.* at 228 n.6.

To the extent that this language is intended to address the fair notice question and to make the point that actual consent is not a jurisdictional prerequisite, it is consistent with the position taken in this article.

59. 436 U.S. 84 (1978).

60. *Id.* at 98.

61. *Id.* at 96.

62. *Id.* at 92.

even if the defendant had had the requisite contacts with California.

In the third case, *Rush v. Savchuk*,<sup>63</sup> involving the validity of Seider-type garnishment jurisdiction under the *Shaffer* test, the Supreme Court stressed that the defendant had engaged in no purposeful activity related to the forum State of Minnesota stating, “[i]t is unlikely that [the defendant] would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move.”<sup>64</sup> While the emphasis here is on the well-established rule that a plaintiff may not create jurisdiction over the defendant by a unilateral act, such as moving to Minnesota, the jurisdictional expectation language is somewhat disturbing. In terms of result, however, it appears that this statement again merely supports a fairness decision. This decision was based on the facts relating to purposeful availment or the lack thereof, regardless of any actual, subjective expectations of the defendant.

Perhaps the most important case in this field is *World-Wide Volkswagen v. Woodson*.<sup>65</sup> Seaway, a New York local automobile dealer, and World-Wide, a distributor to dealers in New York, New Jersey and Connecticut, were sued in Oklahoma, where the accident took place, on a product liability theory. The plaintiffs had purchased the Audi in New York. Jurisdiction was based on Oklahoma’s long-arm statute. In upholding defendant’s amenability to suit, the Oklahoma Supreme Court used an “effects” test reinforced by a finding that the defendants could have foreseen the possible use of the Audi and that they did derive substantial income from automobiles used in Oklahoma. This finding in turn was predicated on the mobility of the automobile and on evidence that some automobiles sold by defendants had in fact been used in Oklahoma.<sup>66</sup> The foreseeability related to a fact, to wit the possible use of the particular car in a certain state.

The Supreme Court reversed the Oklahoma Court’s decision on due process grounds finding a “total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction.”<sup>67</sup> The defendants had not served the Oklahoma market in any way: no advertising or selling efforts, no solicitation of business in Oklahoma and no regular sales of cars to Oklahoma customers or residents at wholesale or retail directly

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63. 444 U.S. 320 (1980).

64. *Id.* at 328-29.

65. 444 U.S. 286 (1980).

66. 585 P.2d 351 (Okla. 1978).

67. 444 U.S. 286, 295 (1980).



or through others. Jurisdiction, thus, was based solely on one isolated occurrence resulting from a fortuitous circumstance.<sup>68</sup> Because the plaintiff's argument relied heavily on this occurrence, the Court dealt extensively with the foreseeability that a fact, that is *the injury*, would occur in Oklahoma: "[F]oreseeability alone has never been a sufficient benchmark for personal jurisdiction. . . . [If it were so], every seller of chattels would in effect appoint the chattel his agent for service of process."<sup>69</sup> Then came the key passages:

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the Forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. [*Kulko*; *Shaffer*] . . . The Due Process Clause, by ensuring the 'orderly administration of the laws' [*International Shoe*] gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.<sup>70</sup>

Those manufacturers or distributors who serve a particular market directly or indirectly, including the delivery of products "into the stream of commerce with the expectation that they will be purchased by consumers in the forum" are amenable to suit in that forum on a "purposeful availment" theory.<sup>71</sup> The mere accrual of "financial benefits . . . from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. [*Kulko*]."<sup>72</sup> The message of *World-Wide Volkswagen* on the issue of party expectations is rather clear and sensible. "Effects" jurisdiction in a state supported solely by the foreseeable *possibility* of the injury occurring there, is insufficient for due process purposes. What is needed in addition is that defendant have more significant contacts and connections with the state such as purposefully serving the local market directly or indirectly. Apparently, regular out-of-state selling to instate customers where the cars are likely to be used would be a sufficient contact with the instate market.<sup>73</sup> If

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68. *Id.*

69. *Id.* at 295-96.

70. *Id.* at 297.

71. *Id.*

72. *Id.* at 298.

73. *World-Wide Volkswagen* does not purport to cover all aspects of long-arm "effects" jurisdiction relating to products liability. It would appear that an isolated sale of a car in New York to an Oklahoma resident would not amount to regular

the requisite contacts and connections do in fact exist, then, by way of explanation and justification, the Court refers to the reasonable jurisdictional anticipations of the defendant and to his ability, knowing the rules, to plan his transactions. Thus, the anticipations do not create or support the rules but rather they are based on them and make planning possible.

THE CONFLICTS CASE: *ALLSTATE INSURANCE CO. v. HAGUE*<sup>74</sup>

In the preceeding jurisdictional cases party expectations were relied upon either in the proper factual foreseeability sense or in a conclusory form to support a jurisdictional determination already based on other contacts. *Allstate*, however, not only confused the distinction between expectations of fact and expectations of law but it also used disembodied expectations, which are expectations of events which did not materialize, as a major independent choice-of-law factor.

Perhaps it would be useful before analyzing *Allstate* to review the due process standard which supposedly prevailed in conflicts. Professor Kirgis has formulated a detailed and accurate two-part test. The forum may apply its law consistently with due process only if:

- (1) Any transaction, conduct or occurrence closely connected with the claim for relief or defense on that issue [in dispute] has taken place in the forum or the party resisting application of forum law has some

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service of the Oklahoma market sufficient to support long-arm jurisdiction even where it was foreseeable and anticipated that a resale will take place in Oklahoma. But placing the product into the stream of commerce for resale in Oklahoma would clearly constitute regular service. See *Volkswagenwerk A.G. v. Klippan*, 611 P.2d 498, 500 (Alaska 1980). It is for this reason that in *World-Wide Volkswagen* the manufacturer and national distributor did not object to jurisdiction.

Although the issue is not free from ambiguity, it seems that it is not necessary that the particular product causing the harm within the state must have reached the state in a transaction involving stream of commerce foreseeability, at least so long as similar products did so. In *Le Manufacture Francaise v. District Court*, 620 P.2d 1040 (Colo. 1980), involving a Michelin tire sold in Germany and there incorporated in a Fiat automobile by the buyer, the regular service of the Colorado market by Michelin of France was held sufficient under due process for *in personam* jurisdiction over Michelin. Cf. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969).

Query whether regular selling within a state to residents of such a state but with the expectation of frequent probable use in the adjacent states would support jurisdiction. See the Marshall and Blackmun dissents, 444 U.S. at 313-19.

By contrast, a single sale in Oklahoma would support jurisdiction there on a transactional basis. It is on this issue that dissenting Justice Brennan is most critical of the majority. *Id.* at 306-09. Under Brennan's analysis, due process is in principle satisfied by mere predictable "effects" within the state provided that the contacts between the *plaintiff* and the state generate sufficient state interests to sustain jurisdiction. *Id.* at 309-13.

74. 449 U.S. at 313-20.

nonminimal relationship with the forum that is reflected in the content or policy of the forum's rule, *and*

(2) application of forum law would not be manifestly unfair to the party resisting it. Manifest unfairness exists when the resisting party has not done anything . . . in the forum to which the specific forum rule attaches significance . . . if (a) [when a material benefit is involved] no substantial part of the actual or anticipated benefit is desired] from sources or occurrences within the forum . . . or (b) no material benefit was expected and the resisting party would not have reasonably foreseen that any of the 'power' conditions (as set out in paragraph (1) *supra*) would be met in the forum . . .<sup>75</sup>

This formulation requires first, the actual existence of certain minimum contacts with the state and second, certain connections between the party subjected to the law of a state and the state itself. Examples of such connections include the party's conduct within the state to which the specific rule is directed, the factual expectations of benefits from sources or occurrences within the forum or the factual expectation of the occurrence of the power conditions (contacts) with the state.

In the long-awaited Supreme Court decision in *Allstate*, a divided Supreme Court gave a clean bill of constitutionality to probably the most expansive assertion of legislative jurisdiction by a state. In the process, the Court's majority virtually eliminated the "transaction, conduct, or occurrence in the state" requirement, and instead relied on nominal relationships (doing business by defendant) which had *no* connection with the forum rule which was applied. Furthermore, the Court was unanimous in treating the unrealized expectations of the parties as a factor of major importance in making fairness determinations under due process and full faith and credit.

A brief review of the facts and issues in *Allstate* is needed at this juncture. The wife of a Wisconsin decedent who had been employed in and had commuted to Minnesota was appointed in Minnesota as personal representative of her husband's estate. She, thereupon, commenced suit in Minnesota against Allstate to recover uninsured motorist benefits for the husband's death in a Wisconsin accident not involving any of the insured cars. The decedent at all times was a Wisconsin resident and so was his wife until his death. She later moved to Minnesota. The policy had been issued and delivered in Wisconsin and provided coverage throughout the United States. The issue was whether "stacking"

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<sup>75</sup> Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 103-04 (1976).

of the uninsured motorist benefits, which was permitted under Minnesota but not under Wisconsin law, was available. The policy did not expressly deal with the issue nor did it refer to an applicable law. Jurisdiction was based on Allstate's doing business in Minnesota. The Minnesota Supreme Court, applying a garbled version of Leflar's theory of choice-influencing considerations, applied Minnesota law, and the United States Supreme Court affirmed that holding five to three. The plurality opinion was written by Mr. Justice Brennan and the dissenting opinion by Mr. Justice Powell. Mr. Justice Stevens concurred separately. Mr. Justice Stewart took no part in the decision.

Brennan made a case in favor of Minnesota law by relying principally upon the plaintiff-related Minnesota contacts which were the decedent's commuting employment, the plaintiff's appointment and the *bona fide* residence acquired after that appointment and the administration of the estate in Minnesota.<sup>76</sup> Brennan also relied on the contacts of the *litigation* with Minnesota arguing, in a most questionable manner, that the out-of-state death of a Minnesota employee is a Minnesota contact *with the occurrence*, thus in effect transforming personal contacts into litigational ones.<sup>77</sup>

Are solely plaintiff-related contacts sufficient for choice-of-law or should there also be a minimum of defendant-related contacts and fairness to the defendant? A plaintiff-oriented choice-of-law would come conceptually close to the so called "passive personality principle" in international law, which is generally disapproved,<sup>78</sup> and to Article 14 of the French Civil Code which exorbitantly bases jurisdiction on plaintiff's nationality alone.<sup>79</sup> Brennan did not, however, address this question directly<sup>80</sup> but instead sought refuge in some defendant-related contacts including the unrealized expectations of Allstate. Brennan, in reference to Allstate's doing business in Minnesota argued that:

[It] can hardly claim unfamiliarity with the laws of the host jurisdiction

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76. 449 U.S. 313-17.

77. *Id.* at 315 n.20.

78. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965). Minnesota is apparently using a "passive personality principle" in choice-of-law by applying its tort law in favor of its residents in situations without any defendant-related contacts other than that it happens to do other business in Minnesota. See *Schwartz v. Consolidated Freightways Corp. of Delaware*, 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied* 425 U.S. 959 (1976) (comparative negligence). See also *Blamey v. Brown*, 270 N.W.2d 884 (1978), *cert. denied* 444 U.S. 1070 (1980), where Minnesota applied its tort law based solely on unforeseeable and indirect effects in Minnesota, in violation of the requirements of the so-called "objective territorial principle."

79. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 751-52 (2d ed. 1976) and authorities cited therein.

80. 449 U.S. 320 n.29.

and surprise that the state courts might apply forum law to litigation in which the company is involved. 'Particularly since the company was licensed to do business [in the forum], it must have known it might be sued there, and that the [forum] courts would be bound by [forum] law' " *Clay v. Sun Ins.*, Black dissenting. [Brackets in the original].<sup>81</sup>

In the accompanying footnote, Brennan further stated that:

There is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved. . . . Indeed, Allstate specifically anticipated that Mr. Hague might suffer an accident either in Minnesota or elsewhere in the United States, outside of Wisconsin, since the policy it issued offered continental coverage. . . . At the same time, Allstate did not seek to control construction of the contract since the policy contained no choice-of-law clause dictating application of Wisconsin law.<sup>82</sup>

In an earlier footnote related to Allstate's presence in the state, Brennan again dwelled on Allstate's purported choice-of-law expectations:

Of course, Allstate could not be certain that Wisconsin law would necessarily govern any accident which occurred in Wisconsin. . . . Such expectation would give controlling significance to the wooden *lex loci delicti* doctrine. [Which is no longer controlling]. . . . Thus, reliance by the insurer that Wisconsin law would necessarily govern any accident that occurred in Wisconsin, or that the law of another jurisdiction would necessarily govern any accident that did not occur in Wisconsin, would be unwarranted. . . . If the law of a jurisdiction other than Wisconsin did govern, there was a substantial likelihood, with respect to uninsured motorist coverage, that stacking would be allowed. . . . Clearly then, Allstate could have expected that an anti-stacking rule would govern any particular accident in which the insured might be involved and thus cannot claim unfair surprise from the Minnesota Supreme Court's choice of forum law.<sup>83</sup>

There are three elements in Brennan's analysis of the defendant-related contacts but not one of them can survive even a cursory critical review. First, Allstate's presumed familiarity with Minnesota law does not supply the required defendant-related contacts. A person's mere familiarity with a particular law is not and has never been an independent or even an auxiliary due process reason for the application of such law in the absence of the requisite contacts or connections. Second, Allstate's knowledge that it might be sued in Minnesota and that its courts "would be bound by [its] laws" also constitutes insufficient contacts. Surely, the fact that Allstate was amenable to suit in Minnesota neither

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81. *Id.* at 317-18.

82. *Id.* at 318 n.24.

83. *Id.* at 316-17 n.22.

created an expectation nor provided a justification for the application of Minnesota law *in violation of due process*. Thus, this element begs the question of what constitutes due process.<sup>84</sup> The similarity in the considerations supporting jurisdiction and choice-of-law does not mean that jurisdiction equals forum law. Finally, the point is made that because of the policy's continental coverage and its silence on applicable law, Allstate could not have justifiably expected, in the context of the modern conflict methodologies, that only Wisconsin law would apply to the policy either as the *lex loci contractus* or as the *lex loci delicti*. But does the fact that Allstate had no "vested right" in a particular law under the prevailing conflicts system mean that any law whatsoever could have been applied against Allstate without violating due process? Or, more appropriately, is it necessary that choice-of-law in itself must be based on the requisite minimum contacts? If anything, Allstate justifiably expected that it would be subjected only to such laws as may be applicable consistently with due process. Using Allstate's purported expectations about the law to support the application of such law is unpersuasive and circular.<sup>85</sup>

What is left, in addition to the plaintiff-related contacts and defendant's doing business and being potentially subject to regulation in Minnesota, is that the policy covered the decedent wherever the *locus* of the loss, including Minnesota. Is this extended coverage a sufficient or even a significant contact to support a choice-of-law decision? Both in *Watson v. Employers' Liability Assoc. Corp.*<sup>86</sup> and in *Clay v. Sun Ins. Office Ltd.*,<sup>87</sup> the loss covered by the policy did occur within the state whose law was applied. *Allstate* stands alone in treating the geographical

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84. Cf. note 19, the Brennan dissent in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 311 (1980): "One consideration that might create some unfairness would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply."

If indeed the law could not justly apply then it could not be imposed on the defendant whatever the forum. Accepting the pro-forum biases of the courts instead of ignoring them or even opposing them is not only unjustified but it leads to confusion on the issue of due process and on the differences between jurisdictional and choice-of-law considerations.

85. What is puzzling here is that the circuitry of the argument on legal expectations had been recognized by Brennan himself in the jurisdictional context in his *World-Wide Volkswagen* dissent:

The Court suggests that this [reasonable anticipation of being haled into court] is the critical foreseeability rather than the likelihood that the product will go to the forum state [foreseeability of a fact]. But the reasoning begs the question. A defendant cannot know if this action will subject him to jurisdiction in another state until we have decided what the law of jurisdiction is.

444 U.S. at 311 n.18.

86. 348 U.S. 66 (1954).

87. 377 U.S. 179 (1964).

coverage of an insurance policy, in and of itself, as a substantial conflicts factor. The uninsured motorist coverage involved in *Allstate* was first-party insurance similar to casualty, medical and life insurance and it was different from third-party liability insurance.<sup>88</sup> The insured asserts a claim based on contract against his own insurer and the geography of coverage is clearly less significant than in a liability claim situation. In liability insurance, the amount of payment may well depend on the liability laws of the state where the insured acted and/or caused injury. By contrast, in loss (first party) insurance, it is the place of the making that normally governs although the residence of the insured and the principle location of the risk may be relevant in determining the applicable law. The mere possibility that the risk may materialize in another state, or in fact does so materialize, carries no weight and should not suffice as a minimum contact.<sup>89</sup>

Apparently because the uninsured motorist endorsement was appended to an automobile liability policy and because Allstate failed to articulate the distinction the Court misconstrued the issue<sup>90</sup> and relied heavily on the mobility of the insured automo-

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88. See, e.g., 7 D.W. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 274.2 (3d ed. 1966):

Uninsured motorist insurance is in the nature of a contract of indemnity. Such insurance is not liability insurance in any sense, but it resembles limited accident insurance; it does not undertake to protect the insured against liability he may incur to others, as does liability insurance, but rather insures him against losses occasioned to him by a limited group of tortfeasors.

89. On insurance choice-of-law, see R. LEFLAR, *AMERICAN CONFLICTS LAW* 314-16 (3d ed. 1977); CARNAHAM, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* 51-52, 264-68, 325-27 (2d ed. 1958).

In *Allstate*, Brennan cited *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943) in support of the proposition that the presence of an insurance company in the state gave such a state an interest in regulating the company's obligations affecting a resident plaintiff who had been appointed personal representative of an estate. 449 U.S. 318. Powell quite properly pointed out that under *Hoopeston* a state has "no interest in regulating that conduct of the insurer [which is] unrelated to property, persons or contracts executed within the forum State." *Id.* at 338.

90. The misconception of the nature of the insurance involved started in the Minnesota Supreme Court where it was stated that:

Minnesota contacts with and interest in the facts of the present case are, however, more extensive because the contract involved is one *concerning automobile liability insurance*. In so far as the contract is one of indemnity for tort recovery, the kinds of contacts relevant to tort cases may be considered.

*Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47 (1979). [Emphasis added].

When an insurance company doing business in a number of states writes

bile. The insured automobile had nothing to do with this particular type of coverage because the insured was covered personally without any reference to the insured automobile. Since the place of making and performance of the contract, the principle location of the risk and the place of the permanent personal affiliations of all the parties pointed to Wisconsin, the case for the exclusive application of its law should have been quite compelling as recognized by dissenting Justice Otis of the Minnesota Supreme Court.<sup>91</sup> But even if the potential Minnesota effects were to be treated as significant in the present context, given that they did not in fact materialize, the use of the related foreseeability and expectations was extremely dubious and the Brennan opinion must stand or fall on the basis of the other contacts with Minnesota.

Quite interestingly, concurring Justice Stevens considered all the plaintiff-related contacts in *Allstate* as irrelevant and believed that the plurality's reliance on them actually undermined its conclusion.<sup>92</sup> Instead, in line with the jurisdictional cases, he took the position that fairness to the defendant was the key issue.

For due process, Stevens made the expectations of the parties the principle conflicts consideration:

The application of an otherwise acceptable rule of law may result in un-

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*a policy on an automobile, the company knows the automobile is a movable item which will be driven from state to state. The company, therefore, accepts the risk that the insured may be subject to liability not only in the state where the policy is written, but also in states other than where the policy is written, and that in many instances those states will apply their own law to the situation.*

*Id.* on rehearing at 50. [Emphasis added].

As has been explained in the text, uninsured motorist coverage is *not* liability insurance and is *not* related to injuries caused by the insured automobile.

While expressly referring to the lack of connection between the insured automobile and the uninsured coverage (449 U.S. 314 n.18, 315 n.21), Brennan apparently analyzed the case in terms of the potential relevance of the place of the accident in a tort sense (*id.* at 642 n.22 discussing the *lex loci delicti* and interests analysis; *id.* at 643 n.24).

In seeking to distinguish *Allstate* from *John Hancock Insurance Co. v. Yates*, 299 U.S. 178 (1936), concurring Justice Stevens drew the correct distinction between first party and liability policies:

The parties to a life insurance contract normally would not expect the place of death to have any bearing upon the proper construction of the policy; by way of contrast, in the case of a liability policy, the place of the tort might well be relevant. For that reason, in a life insurance contract relationship, it is likely that neither party would expect the law of any State other than the place of contracting to have any relevance in possible subsequent litigation.

*Id.* at 646 n.11. But he failed to perceive the similarity between uninsured motorist coverage and loss policies such as accident or life and assumed instead that the issue in the case involved a tort liability policy.

91. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 50-54 (1979).

92. 449 U.S. at 331.



fairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law. A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. The desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.<sup>93</sup>

The circularity and lack of substantiation which make party expectations as to law and the related concept of unfair surprise meaningless for due process purposes has been already explained.<sup>94</sup> But even if one were to limit the above language to factual expectations as to the relevant contacts, it is difficult to sustain the position that Allstate's reasonable expectations were not frustrated by application of Minnesota's law. The continental coverage of the policy and the absence of a choice-of-law clause could have supported Minnesota's legislative jurisdiction if the expected loss had occurred there. The mere potentiality of its occurrence in Minnesota certainly should not have been sufficient.<sup>95</sup> Yet, this appears to be the Stevens position not only for due process but also for full faith and credit purposes.<sup>96</sup> This position is even more questionable in the context of Justice Stevens' total rejection of the plaintiff-related contacts. Consequently, the *sole* relevant minimum contact remaining was Allstate's presumed expectations that a contact *might* arise in Minnesota. The logic of this approach would support the application against Allstate of the law of *every state within the United States*.<sup>97</sup> In the jurisdictional context, its equivalent would be to sustain jurisdiction over Seaway, the local New York dealer, in New Jersey for the Oklahoma accident on a theory that the accident *might* have happened in New Jersey and Seaway had enough connections with the New Jersey market for long-arm jurisdiction.

It is regrettable that the Powell dissent in *Allstate*, which forcefully disputed the adequacy of the plaintiff-related connections, did not challenge the principal premise of the plurality's finding of fairness to the defendant, namely the relevance of the expectations about potential contacts. Justice Powell all too readily conceded that:

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93. *Id.* at 327.

94. See text, *supra* notes 16-27.

95. See text, *supra* notes 78-82.

96. 449 U.S. at 333.

97. Cf. *id.* at 653 (Powell, J., dissenting). See also J. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 131-32 (1980).

I would agree that no reasonable expectations of the parties were frustrated. The risk insured by petitioner was not geographically limited. [*Clay*]. The close proximity of Hager City, Wis. to Minnesota, and the fact that Hague commuted daily to Red Wing, Minn., for many years should have led the insurer to realize that there was a reasonable probability that the risk would materialize in Minnesota. Under our precedents, it is plain that Minnesota could have applied its own law to an accident occurring within its borders. . . . The fact that the accident did not, in fact occur in Minnesota is not controlling because the expectations of the litigants *before* the cause of action accrues provide the pertinent perspective.<sup>98</sup>

While we note with satisfaction Justice Powell's use of the factual rather than legal concept of "expectations," there are at least three reasons for disappointment. It appears from the quoted passage that Justice Powell again stressed the importance of the place of the accident not making the distinction between first-party loss and third-party liability insurance policies. More importantly, he sanctioned reliance on expectations about potential contacts regardless of whether they in fact materialized. Finally, in another passage on the issue of fairness, Powell referred to the questionable factor that Allstate must have known that it might have been sued in Minnesota<sup>99</sup> which confused the choice-of-law with the jurisdictional inquiry.

#### CONCLUSION

Vindication of the reasonable or justified expectations of the parties is an important goal of all private law extending to conflict of laws and jurisdiction. The conflicts rule which recognizes the actual consensual choice of applicable law by the parties (autonomy) effectuates the volition of the parties while at the same time it strengthens the security of transactions. Comparable considerations support the validation of consent and appearance as jurisdictional grounds and the recognition of choice-of-forum clauses.

It is an entirely different matter, however, to construct a system of hypothetical party expectations of what law should apply or where a party should be amenable to suit. Such expectations are not only unrelated to party volition but cannot be factually substantiated with any degree of certainty. Furthermore, the argument in their favor is circular, begging the question of what constitutes justice and fairness in choice-of-law and jurisdiction. Party expectations as to the facts, not as to the law, such as the foreseeability of harmful effects occurring within a state, play a useful, if auxiliary, role in deciding whether certain contacts and events can be relied upon in the particular case to subject a party to suit in and/or to the law of a certain state.

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98. 449 U.S. at 336-37.

99. *Id.* at 333.

In recent jurisdictional cases such as *Shaffer v. Heitner*, *Kulko v. Superior Court* and especially *World-Wide Volkswagen*, the Supreme Court attributed considerable significance to the reasonable jurisdictional expectations of the parties. An analysis of the reasoning of the majority opinions in these cases shows that, despite some perplexing general language, the Court was referring quite properly to factual and not to legal expectations.

The handling of party expectations in *Allstate Insurance Co. v. Hague*, the long-awaited conflicts decision, is less satisfactory. First, on the theoretical front, the line between expectations of fact and expectations of law is even more difficult to recognize and the ambiguity is compounded by the emphasis placed on the absence of a choice-of-law clause. On the practical front, what is more disturbing about *Allstate* is the apparent unanimity among the eight Justices that the mere expectation that a particular law might apply, given certain contacts, justifies its application even if such contacts never materialize.

The *Allstate* result may perhaps be understandable in the context of the special circumstances of the automobile insurance industry, where typically the defendants are engaged in nationwide business and provide nationwide coverage in all respects to local plaintiffs. In the absence of a choice-of-law clause or a special substantive provision in the policy, it may be appropriate to subject the insurer to the law of any state which either has significant connections with the events or is the state of the permanent affiliations with the insured. But beyond the automobile insurance field, *Allstate* deserves a limited reading and a narrow application of its rationale.

